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CO-OPERATION BETWEEN BENCH AND BAR IN REFORM OF JUDICIAL PROCEDURE.

This journal presented lately in one of its issues the opposing views of its editor and an esteemed contributor on the subpect of judicial procedure. 71 Cent. L. J. 327, 330.

Our contributor wrote very interestingly and instructively about the civil and common law and the attempt in Roman days to meet the various new business relations and changing conditions of society by resort to the "Praetor Urbanus," or judge-made system.

He assumes, we think, that pleading and practice at common law were perfected in a directly opposite way to this. As we, however, understand the origin of common law forms and precedents, judges had as much or more to do with their creation and improvement than the bar. As in the domesday books and in usages and customs we find principles of law our ancestors accepted and their courts applied, so from like sources we trace precedents in pleading and practice. It is to be deduced fairly, that the bar and the bench labored one with the other to bring to its perfection "the pearl richer than the Indies," which the American lawyer dominating legislatures has thrown away.

If we assert that the bar of England is to be more particularly credited with the excellencies in common-law pleading and practice, it may be replied that there is no excellent thing in either coming down to us that has not received the stamp of judicial approval. What better may have been proposed by some genius of our profession and been rejected we do not know That only survived which the courts approved, for statutes did not prescribe common-law precedents in procedure.

Therefore, it seems to us, that all who recognize the excellencies of common-law procedure and the hopeless muddle following its rejection, must come to the view that we can only regain what has been lost by following the course our English ancestors followed, and that course, as we understand it, was that those, who were servitors in the administration of the law, co-operated in devising proper ways and means therefor.

Our esteemed contributor, we respectfully submit, labors in vain in trying to impress on this country any fear of an American "Praetor Urbanus," or that there may arise here any "custom for Praetors (judges), on entering upon their office, to publish an edict declaring the principles upon which they intended to administer justice during the year of their praetorship." We do not see how it is any more possible for a particular judge in his particular court to have the right to disregard a rule of procedure a convention of judges is authorized to prescribe, than it is for him to disregard what a legislature prescribes.

We do seem to know, however, that if judges who put the touchstone to rules of pleading and practice, have no voice in their framing or correction, the courts over which they preside become lamentably inefficient.

The "Praetor Urbanus" system, assuming that our contributor correctly represents the judgment of history thereon, brought about the conclusion, that "there could be very little fixed principle in the law, if it were left to mere judicial development." But what is needed in this day is that somewhere there should be imposed responsibility for something besides mere experimentation in reform of judicial procedure. In common-law times court and lawyer assumed such responsibility and our contributor extols the result.

At this time the volunteer lawyer, without the aid of the court, attempts to achieve more than they did, and his plan is not long adorning the pages of a statute book before another volunteer lawyer utilizes the creator of statutes to mar its harmonious

excellence or consign it to "the limbo of things that were."

It seems to us that the common-law system of practice and procedure grew to its perfection out of instances. Lawyers of its time acted upon the principle of *ubi jus ibi remedium*, and, framing the remedy to obtain the vindication of a right, submitted it to a court of appropriate jurisdiction. The proposed remedy then became the target for all adversary shafts of criticism. If it withstood assault, it became a precedent. As all such propositions had to undergo an ordeal of fire, the residuum in the crucible was the common-law system—a consistent, interrelated whole, and yet capable of extension to newly-discovered rights by reason of the principle in its growth.

Procedure developed *pari passu* with principle, because the courts which felt impelled to administer the latter, as founded, according to their conception, upon inherent justice, were peculiarly solicitous, that the former should be appropriate. Possibly, if the mere *fiats* of statutes had been their inspiration, their sometimes lack of justice might have derogated from the perfection of remedies.

However that may be, the enforcement of rights, intrinsically just or so deemed by the judges, may well be supposed to have been a great influence, at the beginning, in the framing of proper procedure for their vindication, and, afterwards, its logical application to the written law.

It is almost inconceivable that in such times as preceded the written law the bar and the bench were not necessary to each other in the vindication even of acknowledged right, the former striving against a too sweeping generality in remedies, and the latter desiring to make them as broad as justice would permit. Between these opposing tendencies the true mean was sought, and until it was reached neither was content.

In the enforcement of a purely written law, whether its command be just or unjust, a different situation is presented than that, in which the foundations of our common-law procedure were laid. But they are not for such reason to be less regarded.

The principle of co-operation is as well needed in the one case as the other—possibly even more now than then. Then, the court knowing whether or not an asserted right was just, could more easily prescribe the remedy. Now conditions are more complicated and common law and statutory rights so shade into each other, that remedies need to be moulded with a freer and yet a more adept hand.

It was not in the first pleading at common law that particularity was found, but it was by plea, replication, rejoinder, surrejoinder, rebutter and sur-rebutter that a precise issue was reached. These being abolished all manner of motions and demurrers appear, greatly inefficient, however, in keeping evidence within reasonable compass, sometimes an accepted theory by the parties making what pleadings there are of no importance whatever.

Notwithstanding all this, we hear a great deal of the principle of *res judicata* requiring exactitude in pleading. This is greatly a phantom issue, for of all the rare things in the world, possibly one of the rarest, is that of a suit brought for the very thing that already has been determined between the parties. One judgment for anything but money is as good as a dozen, and we do not remember ever hearing of a second suit for a debt that is at the time in judgment. After all, to guard against a possible second judgment or jeopardy is simply a question of practical detail. A dozen methods might suffice.

It seems to us that the building up of common-law procedure was ideal in being through the joint efforts of the bar and bench of England. We cannot get co-operation one with the other through any legislative code. It can hardly be thought that, if the courts were vested with power to frame rules of procedure, they would reject the assistance of the bar. Indeed, all experience in this country shows that between the best judges in our courts and the bar, there is a relation that implies mutual reliance in the administration of justice,

and when a system for the framing of rules of procedure separates them, the public suffers.

Our courts, when there is need, frame their decrees in equity and interlocutory orders, as emergencies require, and formal objections are not encountered on the equity side so much as on the common-law side. If there is jurisdiction, a meritorious claim, a sufficiency of parties and relief demandable in equity, there are few obstacles attempted to be interposed to the hearing of a cause. Is this not because the courts, sitting in equity, are not so much compelled to struggle in the fetters legislatures have fastened upon them, and because counsel are of less assistance to them in attempting to apply statutory rules? Notice, after all, is the essential ingredient of due process of law. The more simply it is given, and the more completely real issues are stripped bare before trials are begun, the more will opportunity for error be eliminated.

Many a case would not go to a jury at all, if the issues were first sifted down, or if it did, would be expeditiously disposed of. Who cannot recall cases that consumed much time in the introduction of evidence and the jury peremptorily instructed, or a non-suit taken?

NOTES OF IMPORTANT DECISIONS

CORPORATIONS—RIGHT OF A DOMESTIC CORPORATION TO USE ITS CORPORATE NAME IN TRADE WHERE THIS CREATES UNFAIR COMPETITION.—Usually statutes forbid the duplicating of names in domestic corporations, but it is not provided that a domestic corporation shall not take the name of a foreign corporation doing business in a state, neither have we seen that it has been provided anywhere, that a foreign corporation, licensed to do business in a state, shall not do so by its corporate name, notwithstanding a domestic corporation may bear the same or a similar name.

The federal circuit court for the Southern District of New York recognizes that a state may confer on its corporations whatsoever names it wills, and allow them to carry on business thereunder despite the fact that this might be a tortious use. Where, however, a domestic corporation chooses a name, for the purpose of "diverting and disarranging" the business of a foreign corporation, or, in effect, trading on the foreign corporation's business its use of the corporate name was enjoined, on the presumption that the state intended "that the corporate name is given merely as the name, which the entity may use so long as it acts in accordance with law. By the name so chosen it gets no license to commit what would otherwise be a tort." U. S. L. & H. Co. of Maine v. U. S. L. & H. Co. of N. Y., 181 Fed. 182.

This ruling, instead of interfering with a state in its domestic affairs, assists in preserving the integrity of its laws, and it is pleasant to witness the tenor of the opinion by the federal judge. Too often there seems something of a strain, as if an opportunity to nullify some state statute or policy was not very unwelcome. Ruling, however, like the above should assist toward a friendly rivalry in state and federal courts, instead of making them look askance at each other.

STATUTES OF LIMITATION—CREDIT AS NEW STARTING POINT AGAINST A SURETY.—The Georgia Court of Appeals lately ruled, that, notwithstanding it was "settled law in that state for a quarter of a century at least," that "a payment by one or two more joint contractors, within the statute and before its bar has attached, constitutes a new starting point for the statute," this principle does not apply to a surety who does not make the payment. McLin v. Howey, 69 S. E. 123.

The court relies as much for its conclusion upon the spirit of statutory law as upon the principle that: "A contract of suretyship, being one of strict law, cannot be extended except by the act or conduct of the surety himself."

This ruling would not seem to be entirely just, because it goes too far, when it is considered that the plea of the statute of limitation is merely a personal plea. Thus it is conceded by the court, that, if payment in full is made by a co-surety before this bar has attached, he can sue for contribution, and this suit was of that nature. As we understand the ruling the surety who made payments before and after the bar attached, was held to have no right of contribution whatever. As the court ruled, it is fairly to be deduced, that if a co-surety pays before the bar has attached, he must bring his suit for contribution within the time action upon the original indebtedness would have to be brought, as otherwise the original liability would, in effect, be extended.

If there is a right of contribution it seems to us it should have its own independent period of limitation. If it has, the co-surety suing for contribution should have been allowed this pro tanto.

SALES—RIGHT OF SUBSCRIBER TO SERIAL SET OF LAW BOOKS TO SELL BEFORE COMPLETION OF SET AND INSIST ON CONTINUATION OF DELIVERIES.—It was contended by a certain book company that where a subscriber to its cyclopedia of laws sold his set to another he could not insist on the company continuing to supply him to the end of the series. Rockwell v. American Law Book Co., 76 Atl. 334.

It appears that the subscriber, Rockwell, had received twenty-six volumes of the Cyc and exchanged them with a firm of attorneys for other law books, his subscription to be still in force so that this firm would acquire the Cyc complete. Before the law book company became aware of this exchange it delivered to its subscriber vols. 27, 28 and 29 and ascertaining what had been done it refused to deliver volume 30. Thereupon, the subscriber sued for breach of contract and recovered the amount he had paid for the 29 volumes.

The case is scant, but this recovery must have been sustained on the theory, that the books of an incomplete set were practically worthless. The case was affirmed by New Jersey Supreme Court, and the ruling was on the ground that there was nothing in the contract to prevent sale to another.

The essence of a contract of this character seems to us to bind the seller to keep the volumes in the serial up to a certain standard, and whether he does or not, may be the occasion of substantial dispute between him and a buyer.

Looking at the matter from this aspect other considerations enter into the question of selection of buyers than that in the sale of staple articles. The seller must satisfy the judgment of his customer upon each volume he furnishes, or, if his objection is of a substantial character, he may declare the contract of sale breached as an entirety, and sue for his damages. In contracts for the sale of goods, wares and merchandise, in general aspect, there may be considered only the likelihood that the buyer is able financially to carry out his agreement and can be made to respond if he breaches it.

As to the sale of a complete cyclopedia, whose constituents appear in installments, conclusion that it is, or not, measuring up to the terms of a contract for a meritorious production is to be deduced differently, than if there were installment deliveries of wheat, corn or lumber. One or two inferior volumes cannot be regarded independently. The entire work may for this be considered as inferior. Therefore, it seems it would not be unreasonable for a seller to claim a subscriber should not be permitted to place upon him the risk of satisfying another than the purchaser the seller has selected. But under the New Jersey decision this must be provided for in the contract if at all.

INSURANCE—PROSPECTIVE OPERATION OF AMENDMENTS IN FRATERNAL INSURANCE—WAGER POLICIES.—An esteemed subscriber calls our attention to syllabus No. 75, 71 Cent. L. J. 325, as being misleading in its reference to Grant v. I. O. S. & D. of Jacob, 52 So. 698, and thinks the ruling of the court would be more correctly summarized as follows:

"Where a life policy was assigned to one without an insurable interest, though within the class of designated beneficiaries, under one charter, which afterwards expired by limitation, a change by the insured to another beneficiary, after the reorganization of the association under a new charter, though not within the designated class of beneficiaries in the second charter, but within that of the first charter, does not make the policy a wagering policy, and is not inhibited."

It seems to us that the syllabus we used is possibly not sufficiently full in not stating the insurance was valid at the outset, but that is assumed. The court in that case decided two independent questions, one that insurance being valid, as against objection that there was a wagering policy, did not become such by being assigned to one without any insurable interest in the life of the assured, and the other that an assured in a fraternal association having by change of beneficiary competent at the time, cut off the original beneficiary, the latter's position was not restored by an amendment, which, if in force at the time of the change, would have prevented same.

The Mississippi court spoke of decision on the former of these questions being "in hopeless conflict," with the law settled for its state by Murphy v. Red, 64 Miss. 614, 1 So. 761, 60 Am. Rep. 62, as above indicated.

Commissioner Whitfield cites an abundance of authority to the other proposition, and, though it be true that a beneficiary in a fraternal insurance policy has no vested interest, but merely an expectancy, it seems not unreasonable to argue, that the familiar rule of construction the court applies was proper. While the beneficiary has no vested interest, the member had what may be denominated a right in selection, and no right should be taken

away by retroactive change, unless no other conclusion is to be deduced. If subsequent classification indicated a policy that should not be infringed, possibly there should be retroactive effect, but, if it only amount to a regulation, it should not. It seems to us the court did not deny the power of the association to make its change in classification operate retroactively, but it only applied a familiar rule of interpretation. In the absence of specific requirement for former designations being or being brought within the new classification of beneficiaries, it seems to us this rule was well applied.

PERPETUITIES—RULE APPLIED WHERE FUND TO BE ACCUMULATED FOR PUBLIC CHARITY MAY NOT VEST WITHIN REQUISITE PERIOD.—One Charles F. McCay, seemingly desirous of projecting memory of his existence into the illimitable future, deposited with a trust company in 1848, the sum of $377.35, which was to accumulate until it and the debt of the state of Pennsylvania should be equal and then be used to pay off that debt. The intending donor, afterwards apparently desirous that memory of himself should be tolled some several centuries, increased his deposit to the sum of $2,000. At the present time the fund approximates $20,000, and for a long time yet it may furnish a head line for the advice many trust companies paying interest on deposits are and will be volunteering so disinterestedly.

This instrument providing for ultimate discharge of Pennsylvania's indebtedness was construed lately by the Third Circuit Court of Appeals so as to determine whether or not the state was vested with an interest, with enjoyment postponed, or, if both vesting and enjoyment was intended to be simultaneous. If the former the rule against perpetuities would defeat the donor's intention, and if the latter, the public charity would save it. Girard Trust Co. v. Russell, 179 Fed. 446.

The view was taken by Gray and Fanning, C. JJ., that notwithstanding "the rule that, when a charity is created is to adopt every means to uphold it, and every attack upon it, unless founded upon the strongest reasons, shall fail," the vesting of the fund was postponed and the gift void. Judge Buffington dissented, and while we do not care to go into the reasoning of the judges on this subject, we will say, in passing, that in our opinion, the dissent was the better reasoned.

We think it was unnecessary if not inept, for either opinion to refer to liberality in construction favoring a charity, because that applies to the establishment of a charity and has no relation to any vesting within the rule against a perpetuity, whether that vesting be ultimately for charity or not.

We wish to note here, that the judges were unanimous in holding that whatever the ultimate purpose of a gift, it must vest at a time not too remote. Thus the opinion states there is violation of the rule against perpetuities where the vesting in an heir is postponed "possibly until beyond a life or lives in being and 21 years and 9 months."

This rule measures perpetuity as beginning at a time when by the course of nature it may be found to begin, but when we may ask is the period to begin when no vesting in heirs is contemplated? Suppose, for example, the donor had provided a fund, which was so large, that expectation of the discharge of Pennsylvania's debt could be hoped for in less than 21 years, to say nothing about a life or lives in being, would the instrument have been declared void as against the rule of remoteness? And, if it would, why would not every gift to be devoted to charity where the vesting was not immediate, be void? It has seemed to us that the application or not of the rule was a pure question of law, determinable from the terms of an instrument attempting to vest an interest in futuro, and that no evidence aliunde, on this question, could be relevant.

The rule as measured in case of heirs is not that the vesting is to occur within any fixed limit of time, but the time may be longer or shorter as the life or lives in being may be continued. It might be as brief as 21 years, 9 months and one day or the vesting might be postponed for a greatly longer time than that, but the period is determinable upon the principle id certum est quod certum reddi potest. What is the rule where the ultimate beneficiary is in being and the vesting is postponed, with the duration of postponement not determinable as in case of heirs? And what, when the beneficiary is not in existence but is to be created by act of the legislature, for example, a corporation to execute a charitable intent?

It is recognized that the rule against perpetuities requires that a vesting must, not may, occur within the limited time, but what is the limit and in what way is it to be determined, when there is no question of inheritance involved, either directly or collaterally?

There is, it seems, some rule of reasonableness about these things, but we do not remember to have heard of its being applied to a case, where the means of making the trust effective, as here money accumulating, go into immediate operation. Something occurs forthwith towards the final event and is an intimate part thereof.

SOME DEFECTS IN TRUST COMPANIES.

This is an age of corporative activity and the shifting of individual financial responsibility. Within the last thirty years corporate growth has been tremendous in the United States.

The laws of corporations have been made applicable to almost every phase of business activity. Companies have been formed not only for the collection of claims and indebtedness, but even for the practice of law—although in the latter instance the courts have refused to recognize them as practicing attorneys. Corporations are now found to act as receivers, as executors, as administrators, as guardians, as assignees, as personal agents, as real estate agents, as insurance agents, as trustees—usually called "Trust Companies." These are far stretches of the corporate idea. The activities of these institutions have resulted both in good and in bad results in the several lines in which they have sought to operate. The methods they pursue cannot always be commended.

The duties of an administrator, an executor, or a guardian are of a personal character. It has been the aim of courts in the past to appoint persons as administrators, executors, or guardians, not only because of their honesty and integrity, but because of their ability to handle the estate or the property of the ward. In the case of the custody of the ward, the appointment usually was made because of the fitness of the person appointed guardian to have custody of a minor.

So in the case of an assignee, a trustee, or a receiver, the appointee was selected because of his personal fitness.

Not only was the person selected appointed because of his personal fitness, but the courts were not prone to permit one person to assume the administration of several estates, usually limiting his activities to one or two at a time, so that the best results would be obtained by his undivided attention. Usually men were selected who had made a financial success of their own affairs.

Every lawyer knows of administrators and guardians who have given as close and careful attention to the administration of the business entrusted to them as if it were their own personal business. Indeed, it was rare to find an administrator or guardian who did not conduct himself in that manner. The same was true of receivers, trustees and assignees. The obligations of personal responsibility for the welfare of their trusts rested upon them as individuals; there were no divided responsibilities which so frequently result in neglect, bad management and loss.

How is it with the Practice of the Trust Companies in these lines?—Trust companies are formed for the purpose of making money for their stockholders. This is the sole motive for their formation. They are not benevolent institutions. but are thoroughly commercial. The larger their dividends the more valuable will be their stock, the more satisfied will be the stockholders, and the more likely will their managers be able to retain their positions.

The income of the trust companies in the handling of trusts or estates depends on the fees they receive as administrators, guardians, assignees, and receivers. If the income from these resources can be increased and the expenses of administration diminished, the larger will be the next dividend; or the value of their stock in the market will be enhanced thereby, because of the undivided profits remaining in the treasury.

In the very beginning the monetary interests of the trust companies are antagonistic to those of the trusts they are appointed to administer; and it is an antagonism with which it is difficult to cope. No court can be expected, in making them allowances, to know all the "ins and outs" of the business, nor always the exact value of the services rendered. To some extent the trusts, over which these Trust Companies are put, are at their mercy.

But at this point another factor enters, which is a far more serious one than the one just mentioned, and this is the cost to the trust companies in handling the business pertaining to estates and trusts. The less the company has to pay its employees, the less the cost of administration will be to the company, and, consequently, the greater the profits. But in the use of a cheap man there is a loss of efficiency. The handling of the property of an estate, of a guardianship, of an assignment, of a receivership, of a trust, requires judgment and business capacity to secure the best results; and these cannot be secured in a cheap man.

It is the practice of trust companies to secure as cheap assistants as is compatible with the dispatch of business, although they are quick to deny this charge. A fifteen-dollar-a-week clerk is often placed in the actual charge of a difficult business, or in the winding up of an involved estate or trust, which requires the insight and experience of a trained business man—such a man as usually was secured before the trust companies came into the field. The best results cannot be thus attained; the best interests of the estate or trust cannot be thus served. Indeed, there is occasionally a manifest inclination to settle up an estate as quickly as possible, if thereby the cost to the company in handling the estate is lessened and the fees to it are the same as if the administration were longer drawn out; thus, to some extent, making a sacrifice of the estate for the benefit of the trust company.

But it is said there is the Board of Directors, who are chosen for their honesty, integrity, and business capacities, and the president for his executive ability, who oversee the business and direct the fifteen-dollar-a-week clerk what to do.

In the case of the Board of Directors there is a divided responsibility, which is often inimical to the best interests of the administration of business, not infrequently to the honesty of the transaction. All men, who have had anything to do with commercial corporations, are only too well aware of this fact. And there is another factor, and that is, that men will do things in business, when acting with others as officers of a corporation, from which they generally shrink if called on personally to face the transaction. Here is the divided responsibility—the shifting of the odium of a transaction from one set of shoulders to other sets as an excuse for conduct, which the shirking individual would never do if he were solely responsible for his own acts. Besides the Board of Directors do not, as a rule, act on their own observations, but on information furnished to them by the employees of the company.

In the case of the president, or other managing officers, he too is apt to act on representations made to him by the employees in the immediate charge of the estate or trust, and, of course, the best results cannot be secured thus. But here the president is at another disadvantage. He has many things on hand. He must act with celerity, and often on first impressions, in order to get through with the business of the company. Any other course would involve him in endless confusion. He cannot enter into the minute details of the estate or trust—a thing so often necessary to secure its best interests.

Where an individual of capacity, who has the best interests of the estate or trust at heart (and that is almost universally the case), is appointed administrator or trustee, all these defects are practically avoided.

Trust companies claim that the funds or property entrusted to their custody are safer than if in the hands of individuals, and they use this as an argument to secure business. But it must be borne in mind that these institutions are usually not required to give a bond to secure the faithful administration of the estates and guardianships entrusted to their care[1] while

(1) I am not aware whether or not it has ever been decided that a statute permitting a trust company to act as administrator or guar-

individuals are required to do so; and although individuals have been recreant to the trusts placed in their hands, the percentage of losses is very small in comparison with the amounts administered on. There is a good deal of the "scare crow" business about this claim.[2]

Trust companies also use the argument that they pay interest on the funds of the estates in their hands, but those who have had much to do with these companies in this connection are painfully made aware of the fact that the amount of interest accounted for in final settlements is quite insignificant—usually three or four per cent, and that by no means running over the entire period that the funds have been in their custody.

But there are some things that many trust companies—not a few—do, that are far from desirable.

One of these is the "drumming" for business. Many of them are as despicable in their methods of obtaining business as "ambulance lawyers," the only difference being the difference in the kind of business they seek. Not infrequently the body of the deceased is no more than under the sod until an officer of a trust company is ringing the door bell of his late residence and presenting to the widow and the heirs the advantages of an administration by his company. Even friends of the deceased are sought to obtain their influence with those interested in the estate. This is a complete reversal of the old order of affairs, and a course of conduct that no lawyer of any delicacy, and few of any sense of the fitness and propriety of things, is willing to pursue. It is distinctly a violation of a lawyer's code of ethics as expounded by all writers on that subject.

But often these companies are not content to wait until the demise of the owner of the property. They give out that they will write wills for nothing, and will keep them in their vaults without charge; and on such occasions the suggestion that they be appointed executors is very easily made, and usually with successful results. Of course, the fifteen-dollar-a-week employee often writes the will. But what is going to be the result if the will be a complicated one?

Nearly every trust company has an invisible connection with a bank—usually a national bank. Officers of these national banks are often on the directorate of the trust companies, or are heavy individual stockholders therein. As is well known, national banks cannot loan their funds on real estate security, but it is very easy to loan the bank's funds to a favorite trust company, which can loan them on real estate security. Thus, there is almost an evasion by the bank, through the convenience of a trust company, of the national banking act.

The officers of all trust companies do not confine their activities to the management of the financial affairs of their companies. Instances are well known where they have sought, and successfully, too, to reach the judicial bench. They have been the endorsers and backers of candidates for those high offices, and those running against such candidates have often found that the current set in favor of such persons was a very strong one to stem, not infrequently bringing about their defeat. When the candidate thus backed is successful, the reward of those officers comes in

dian without giving bond is invalid, because of the fact that individuals appointed as administrators or guardians must give bonds for the faithful accounting of the funds of their trusts. Is this not such discriminatory legislature as renders the statutes permitting trust companies to serve without giving bonds unconstitutional?

(2) Trust companies have failed, even very large ones, to the great injury of trusts in their charge. While it is true, losses to estates and trusteeships have been occasioned by the unfaithfulness of those appointed to administer upon them, yet their administrator bonds are usually sufficient to protect the beneficiaries. Of the enormous amount of property and money involved in estate, guardianships, receiverships (really never in these) and the like, the percentage of losses is exceedingly small, although when gathered into one aggregate sum it gives the impression that such trusts are recklessly handled and constantly subject to the prey of those appointed to take charge of them. Trust companies at this point indulge in great exaggeration in setting forth their claims of alleged superiority.

their company being appointed administrators, guardians, receivers, and the like. Lagging trust companies have thus been put to the very front row of success; and instances are known of companies whose stock greatly rose in value after the candidate thus backed had been elected judge of a probate court, for they "owned" him.

These are some of the reasons why trust companies are not as desirable in the handling of these kinds of trusts as private individuals are; and instances are not unknown where they have used their powers to wreck the estates, or to depreciate the value of their assets, while some of their favored stockholders stood ready to reap the advantages thus opened for investments. In the latter instances we have only an exhibition too common in the commercial transactions of corporations.

There is another thing in this connection few think of. These trust companies constantly use the funds of estates (not guardianships nor trusteeships), assigneeships and receiverships in their own private business and never account for the profits. It is the law, as all know, that if an administrator use the funds of his trust in his own business or in an investment for himself, he must account for all the profits he receives, and the courts will hold him to a strict accounting. Yet trust companies do not account for such profits. They escape under the plea that they are paying interest on the funds of the estate (which is often not true), and therefore have a right to use them in their business; but the rate paid is often two and three per cent only (and then not for the full period the funds are in their custody); and this very money on which they pay this low rate of interest, they, during the period they are paying it, usually loan out at a higher rate of interest, which they convert into their own coffers, thereby making a profit out of the funds by loaning them, a thing a court would not tolerate for an instant in an individual.

These trust funds are sometimes invested in real estate adventures, in the name of some proven individual, and thereby a profit for him and the company made without either putting up a dollar of their own funds.[3]

A. K. MONTROSE.

(3) That some trust companies hold out as an inducement to persons of moderate means that if they will deposit their funds with them they will shift them so as to avoid taxation is a well-known fact.

LANDLORD AND TENANT—FAILURE TO REPAIR.

GRAFF v. WM. J. LEMP BREWING CO.

Kansas City Court of Appeals, Missouri, July 9, 1910.

129 S. W. 1005.

A promise by a landlord to repair defects in the premises, so dangerous as to constitute a constant menace to the personal safety of the tenant, made at the time of the letting, with knowledge of the defects, creates a duty, the negligent breach of which by the landlord is a tort, and the tenant may sue in tort for a personal injury sustained in consequence of the defects

Appeal from Circuit Court, Jackson County; Herman Brumback, Judge.

Action by John Graff against the William J. Lemp Brewing Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

JOHNSON, J.: This is a suit by a tenant against his landlord to recover damages for personal injuries which it is alleged were caused by the negligent breach of the landlord's duty to repair the premises. Defendant demurred to the petition on the ground that it failed to state facts constitutive of a cause of action. The demurrer was sustained, plaintiff refused to plead further, and judgment was rendered for defendant. Plaintiff appealed to this court, and, holding that a good cause of action was pleaded, we reversed the judgment and remanded the cause. 130 Mo. App. 618, 109 S. W. 1044. At the time our opinion was filed, April 8, 1908, our attention had not been called to the opinion of the Supreme Court in Glenn v. Hill, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699, which was filed March 17, 1908, three weeks before the announcement of our opinion. When the cause was again heard in the trial court, defendant renewed its demurrer to the petition, and contended that the doctrine of our decision had been repudiated by the Su-

preme Court in the Glenn Case. The learned trial judge adopted that view of the two decisions, and, giving controlling effect to that of the Supreme Court, again sustained the demurrer. Plaintiff stood on the petition, judgment was rendered for defendant, and again plaintiff appealed to this court.

The prominent features of the present case thus may be stated: At the time of the letting of the premises, the floor of the building not only was defective, but it was in a dangerous condition, and its use by the tenant would be attended by risk of personal injury. With knowledge of this condition, the landlord, as a part of the contract of letting, promised to repair the floor and the tenant relied on the promise. The landlord negligently failed to make the repairs, and the tenant, while properly using the floor, sustained personal injuries in consequence of its defective condition. In our former opinion, we gave complete approval to the doctrine that an action sounding in tort for the recovery of damages for personal injuries sustained by the tenant in consequence of the breach of the landlord's promise to repair could not be maintained, even in cases where the promise was a part of the contract of letting, and held that "the measure of damages in such cases is the expense incurred by the tenant in the doing of the work the landlord agreed to do, but did not, and that personal injuries to the tenant sustained in consequence of the defective condition are a result too remote to be considered as having been in the contemplation of the parties at the time the contract was made." In the Glenn Case this rule was stated in about the same way, and we fail to find anything in that decision which militates against the soundness of the other rule we announced—that while a breach of a mere contractual duty will not afford a cause of action ex delicto, and while ordinarily a breach by a landlord of his promise to repair is to be regarded as a violation of a mere contractual obligation, there are exceptional cases, of which the present is one, where the landlord's failure to perform his promise to repair is more than a mere breach of contract. It is the negligent breach of a duty imposed by the relationship he established with his tenant. That a duty of that nature may be made an integral part of the relationship of landlord and tenant is a proposition recognized as sound by the authorities quoted in the Glenn Case, and we find no intimation in the opinion of the Supreme Court of a disapproval of that proposition.

We repeat here the quotation by the Supreme Court from the case of Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. (N. S.) 504: "It does not follow that this action of tort for negligence can be maintained against the defendant because of her omission in this respect, unless her failure resulted in the breach of a duty imposed by law, as well as the breach of an obligation created by the agreement of the parties. 'Actionable negligence is the neglect of a legal duty. * * * To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. * * * The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations, in the nature of a trust, a moral obligation only, not recognized or enforced by law.' * * * In accordance with the foregoing authorities, it may be stated as a principle of law that, where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty, which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done, and that the mere violation of a contract, where there is no general duty, is not the basis of such an action. This being so, and the relation between the parties to this suit being that of landlord and tenant, and it having been decided in Towne v. Thompson, 68 N. H. 317 [44 Atl. 492, 46 L. R. A. 748], that no duty is imposed by law upon a landlord to make repairs upon leased premises for the benefit of his tenant or a member of the tenant's family, it follows that the present action cannot be maintained because of the mere failure of the defendant to keep her agreement to repair."

We held that the promise of the landlord to repair a defect of a character so dangerous that it would be a constant menace to the personal safety of the tenant created a duty, the negligent breach of which would constitute a tort. Nothing is said in the Glenn Case at variance with this view, and, since we are "of the same opinion still," it follows we must hold that the trial court erred in sustaining the demurrer to the petition.

Accordingly the judgment is reversed, and the cause remanded. All concur.

NOTE.—*Responsibility of Landlord for Personal Injuries in Non-Observance of Covenant to Repair.*—By way of digression we think some allusion may be made to an entanglement between the Kansas City Court of Appeals and the Supreme Court of Missouri, as illustrative of the difficulty there exists under the code system about getting conclusive results from precedents.

When the case the opinion treats was on its first appeal, it quoted prior Courts of Appeals'

decisions of Missouri, that: "Where a covenant creates a duty, the neglect to perform the duty, is a ground for an action in tort"; "When the landlord has agreed to make repairs there is a duty resting on him to do so, and on his failure, the tenant may either sue on his contract, or bring an action on the case founded in tort for neglect of that duty." It summed up authority to the effect that the tenant "must show that there was an apparent necessity for prompt action on the part of the landlord and that the failure of the latter to repair would subject the tenant to the risk of personal injury from using the premises in their defective condition." The court was wondering whether or not it ought "to treat the action only as one arising *ex contractu*," and seems to have arrived at the conclusion it was not bound to so treat it, but why it does not make clear. Seemingly, however, it came to this conclusion, because what was incidentally alleged informed the court, that plaintiff could, had he so desired, have sued in tort for neglect of a positive duty.

The decision by the supreme court to which it alludes, however, whatever the other faults in that decision, was not remiss in failure to say the petition was faulty because it was predicated on a contractual duty. There was fully as much incidental averment in the petition to the effect, that the condition of the premises was dangerous to health as there was in the Graff case that the condition threatened danger to life or limb. Indeed, that feature was stronger in the Glenn than in the Graff case. In the Glenn case the effort to repair increased the danger and the delay in the work was what was alleged to have caused injury. The Supreme Court seems to admit that had plaintiff complained of "negligence in the performance" of what was undertaken, and not because what was undertaken had not been carried out, a good case would have been stated, a distinction almost like dancing on the point of a needle as compared to the broad way in which the Appeals Court construed the petition in the Graff case. Judge Goode, of St. Louis Court of Appeals, in Wernick v. St. Louis & S. F. R. Co., 109 S. W., l. c. 1029, recognizes the principle invoked by the opinion in the principal case and for which it cites Dustin v. Curtis, *supra*, but there is nothing in what he says to show that if one sues upon an agreement it cannot be converted into an action in tort, because what is contractually provided for may merely restate a duty imposed by law. On the contrary, as we gather what he says, if one wishes to sue in tort, he must base his action on a breach of duty imposed by law, and if he aver breach of contract, his action is *ex contractu* and the measure of damages is accordingly controlled and whether there are any? We cannot find any technicality at common law that stresses more strongly than this, but the Kansas City Court of Appeals seems unaware of its existence.

It may be said that the syllabus is confusing and seems to mingle contractual duty with that imposed by law quite indistinguishably and to make the former aid or emphasize the latter, but a reading of the opinion seems to fully justify its form, and this is the error from which it seems the higher state court's decision was ineffectual in rescuing the Appeals Court.

There are, however, some cases which disagree with the principle, that a covenant to repair merely creates a contractual relationship. The case of Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 thus argues, after alluding to the ordinary contractual relationship: "Where the landlord agrees to repair and keep in repair the leased premises, his right to enter and have possession of the premises for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of owner and occupant. And if his negligence in making or failing to make, the repairs, results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises, who are not guilty of contributory negligence on their part."

As in accord generally with this case is that of Sontag v. O'Hare, 73 Ill. App. 432, which, however, does not discuss the question particularly. See also Moore v. Stelljes, 69 Fed. 518.

In Edwards v. N. Y. & N. H. R. Co., 98 N. Y. 248, 50 Am. Rep. 659, it was said: "If a landlord lets premises and agrees to keep them in repair and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured."

All of this seems a singular sort of reasoning, amounting, as it seems to us, to construction that the landlord superadds something to his positive duty in a contractual way, and also that he makes of himself an *alter ego* of the tenant as to third persons.

The great bulk of authority is that the contract is like any other contract and has, within its contemplation for a breach thereof, merely what is generally contemplated by a contract. For cases on this subject see Shackford v. Coffin, 95 Me. 69, 49 Atl. 57; Davis v. Smith, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 479, 106 Am. St. Rep. Tuttle v. Mfg. Co., 145 Mass. 169, 13 N. E. 465; 601; Hanson v. Cruse, 155 Ind. 176, 57 N. E. 904; Thompson v. Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 581. C.

JETSAM AND FLOTSAM.

SOLICITING LEGAL BUSINESS BY LETTERS OR CIRCULARS TO STRANGERS.

We have been furnished with two letters which were handed to members of the Bar by their clients, and of which the following are copies:

"Telephone——

Attorney and Counsellor-at-law,
Broadway,
New York.

Mrs.——

Dear Madam—I have heard of the death of a member of your family. If the deceased left any property or money, it is necessary under the laws of the state of New York first to obtain letters of administration before those who are entitled to it can legally obtain it.

I am making a specialty of this branch of the law and am therefore in a position to render you my services in procuring letters of administration at a minimum fee of ten dollars ($10.00), regardless of the amount involved.

Trusting that this will receive your attention, I am, respectfully yours,

_____"

"_____ & _____,
Attorneys at law,
_____ Street,
New York.
October 30, 1910.

_____, Esq.,
_____,
_____, New York City.

Dear Sir—A client for whom we are general counsel on a yearly contract has very kindly suggested that we lay our plan of legal service before you with a view to securing the work of your company under a similar arrangement. We write you accordingly, and trust you will regard this letter as confidential.

We are retained annually by twenty representative business houses of this city, whose entire legal work, including litigation and collections, we handle on moderate yearly retainers, ranging from $150 to $1,500, payable at the end of the term. The plan of a fixed charge from year to year for legal work has pleased our clients so well that we would not hesitate to accept your business for one year on a minimum retainer, believing that your experiment with us will lead to a permanent arrangement. Under such a contract we would represent you in every legal matter, however large or small, giving you the privilege of consultation and advice at all times.

If you would take the trouble to consult some of our clients we are sure you would find them enthusiastic in recommending our firm and our methods. We feel that our competent staff and perfectly equipped office, warrant us in adding at least one more yearly client to our present reputable and exclusive clientele, and we should be pleased indeed to make the proposed arrangement with you.

May we take the liberty of asking for an appointment at your office or ours, as you may desire, in order that we may submit a form of retainer and go into the matter more fully?

Yours very truly,

_____ & _____."

The above may be taken as fair samples of many communications that are sent out to persons with whom the writers have no acquaintance. Such practice is in conflict with section 27 of the Code of Ethics adopted by the American Bar Association, which provides in part as follows:

"The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews not warranted by personal relations, is unprofessional."

It may be impracticable entirely to suppress unprofessional conduct of this kind. It is probable that lawyers who will send such letters to persons whom they do not know care nothing for professional reproach or social ostracism. They deliberately set about to drum up trade by cut-throat methods. It is doubtful whether the Appellate Division would discipline members of the Bar merely for violations of good taste or infractions of etiquette.

We would suggest, however, that all circulars and communications of this class, which may be brought to the attention of reputable members of the Bar by their clients or others, be sent to the Grievance Committee of one of the Bar Associations. We are authorized to say that the Committee on Grievances of the Association of the Bar of the City of New York will receive and file such documents, and have no doubt that the Grievance Committee of the New York County Lawyers Association would also accept and preserve them. Indexed and tabulated they would form a character plant" of considerable value. Lawyers who violate the professional proprieties subject themselves to unfavorable presumption, and reference to the archives might be of service if at any time charges of substantial misconduct are presented against them.

Moreover, if the Committee on Character appointed by the Appellate Division could have access to lists of systematic advertisers or drummers, light would be thrown upon the influences surrounding, and probable ethical standards, of many candidates for admission to the Bar who had served as clerks or students in offices.

Still further, it may be that the Appellate Division would take cognizance of acts that amounted to gross violations of propriety and etiquette. A lawyer, for example, who sends his card soliciting probate business so that the same is received on the day of a person's death or the following morning outrages the decencies of professional life, and in our judgment is a proper subject for public reprimand, if not suspension from practice.—New York Law Journal.

HUMOR OF THE LAW.

The courtroom was crowded. A wife was seeking a divorce on the grounds of extreme cruelty and abusive treatment. Guns, axes, rolling-pins and stinging invectives seemed to have played a prominent part in the plaintiff's married life.

The husband was on the stand, undergoing a grueling cross-examination.

The examining attorney said, "You have testified that your wife on one occasion threw cayenne pepper in your face. Now, sir, kindly tell us what you did on that occasion."

The witness hesitated and looked confused. Everyone expected that he was about to confess to some shocking act of cruelty. But their hopes were shattered when he finally blurted out:

"I sneezed."

A Las Vegas rancher whose hog was killed by a train wrote to the company's claim agent for a settlement. He penned his communication thus: "Dear Sir: My razorback strolled down your track a week ago to-day. Your twenty-nine came down the line and snuffed his life away. You can't blame me, the hog, you see, slipped through a cattle gate, so kindly pen a check for ten, the debt to liquidate." He received the following reply: "Old twenty-nine came down the line and killed your hog we know, but razorbacks on railroad tracks quite often meet with woe. Therefore, my friend, we cannot send the check for which you pine. Just plant the dead, place o'er its head, 'Here lies a silly swine.' ".—Oklahoma Oklahoman.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Account Stated**—Assent of Debtor.—An express assent to an account is not essential to the creation of an account stated, it being sufficient that the debtor does not object to the account rendered within a reasonable time. —Alexander v. Scott, Mo., 129 S. W. 991.

2. **Action**—Cause of Action.—Where no right has been violated, there is no injury for which the law affords compensation, and it is a case of an injury without damages.—McCoy v. Board of Directors of Plum Bayou Levee Dist., Ark., 129 S. W. 1097.

3.——Joinder of Causes.—A complaint stating a good cause of action of law, though coupled with equitable considerations and a demand for equitable relief, is not fatally defective.—Porter v. Baldwin, Supp. 123, N. Y. Supp. 1043.

4. **Adverse Possession**—Constructive Possession.—Constructive possession of vacant and unoccupied land is in the owner of the title.—Glasgow v. Missouri Car & Foundry Co., Mo., 129 S. W. 900.

5.——User.—Merely fencing land without actually using it in some manner is not such actual possession as will ripen into title.—Hermann v. Fenn, Tex., 129 S. W. 1139.

6. **Attachment**—Nature of Claim.—A defendant who has stolen money from plaintiff is bona fide indebted to him therefor within laws relating to attachment.—Downs v. City of Baltimore, Md., 76 Atl. 861.

7. **Bills and Notes**—Attorney's Fees.—Where a note provides for 10 per cent. attorney's fees in case it is placed in the hands of an attorney for collection and the holder agrees to pay his attorney such amount, the holder can not defeat his liability on the ground that the amount is unreasonable.—Mosteller v. Austin, Tex., 129 S. W. 1136.

8.——Consideration.—A surrender of a note by the payee thereof to the maker is a consideration for a note by the maker and third persons as joint makers.—Dorris v. Cronan, Mo., 129 S. W. 1014.

9. **Brokers**—Real Estate Agents.—It is not essential to recover services in effecting a trade of real estate, that plaintiffs should allege or prove that they were licensed agents.—Sullivan v. Duratt, Kan., 109 Pac. 777.

10. **Carriers**—Injury to Freight.—Cost of articles at the point of shipment, damaged in transportation by reason of a carrier's negligence, held not the proper measure of the carrier's liability.—McHaney v. St. Louis & S. F. R. Co., Mo., 129 S. W. 1065.

11.——Punitive Damages.—The expulsion of a passenger from a mixed train because of refusal to sign a release of liability for injuries which may be received is wrongful.—Schwartz v. Missouri, K. & T. Ry Co., Kan., 109 Pac. 767.

12.——Time for Removal of Goods.—The reasonable time after notice that must be allowed by a railroad company for a consignee to remove his goods from its depot applies to every one, regardless of the consignee's distance from the depot.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co., Miss., 52 So. 797.

13. **Cemeteries**—Establishment. — Persons purchasing land for cemetery purposes must regard both the present and future possibility of improvement in the locality in which the burial ground is to be established.—Iuszkewicz v. Luther, R. I., 76 Atl. 829.

14. **Champerty and Maintenance**—Defense of Champerty.—Champerty cannot be invoked except between the parties to the champertous agreement in cases where the contract is sought to be enforced.—Prosky v. Clark, Nev., 109 Pac. 793.

15. **Charities**—Cy Pees Doctrine.—Cessation of use of chapel for purposes of trust held not to defeat trust nor prevent its being carried out as near as may be according to intention of the donor.—Brice v. Trustees of All Saints Memorial Chapel, R. I., 76 Atl. 774.

16.—**Chattel Mortgages**—Lien.—Chattel mortgages give only a lien on the mortgaged property; the legal title remaining in the mortgagor.—Hughes v. Smith, Tex., 129 S. W. 1142.

17.——Removal of Property.—Where a chattel mortgage was executed and registered

in a county, the removal of the property to another county for more than four months would not effect the mortgagee's right, if such removal was without his knowledge or consent.—Hughes v. Smith, Tex., 129 S. W. 1142.

18. **Constitutional Law**—Legislative Construction.—A legislative construction of a constitutional provision is not binding on the courts, but is only persuasive.—State ex rel. Major v. Patterson, Mo., 129 S. W. 888.

19. **Contracts**—Mutuality.—A claim of want of mutuality in a contract for sale of land held overcome by action of the parties in part performance of it.—Vanity Fair Co. v. Hayes, R. I., 76 Atl. 771.

20. **Conversions**—Realty into Personality.—Where land devised by a base or determinable fee was condemned for public purposes, the fund awarded therefor was subject to the same limitations as the property had been.—Mayer v. McCracken, Ill., 92 N. E. 355.

21. **Corporations**—Doing Business Within State.—Holding real estate by a foreign corporation for investment is not doing business within the state.—Singer Mfg. Co. v. Granite Spring Water Co., 123 N. Y. Supp. 1088.

22.———Estoppel.—One who has negotiated with a corporation with a view of purchasing from the latter personal property already in his possession cannot in an action by the corporation to recover possession of the property, question its corporate existence.—Kelleher v. Denver Music Co., Colo., 109 Pac. 860.

23. **Courts**—Interstate Commerce.—The decisions of a federal Supreme Court that a corporation is engaged in interstate commerce held conclusive on the state courts.—International Text-Book Co. v. Gillespie, Mo., 129 S. W. 922.

24.———Judgments.—A judgment of the probate court within its original exclusive jurisdiction is entitled to the presumptions protecting the judgments of courts of general jurisdiction.—Crohn v. Modern Woodmen of America, Mo., 129 S. W. 1069.

25. **Covenants**—Quantity of Land.—A covenant of warranty is not broken by a shortage in the number of acres named in the deed, though the land may have been sold by the acre.—Mosteller v. Astin, Tex., 129 S. W. 1136.

26. **Criminal Law**—Civil Remedy.—Criminal procedings for larceny having been instituted, the owner of the property sold could sue for the goods or their value without waiting for conviction.—Downs v. City of Baltimore, Md., 76 Atl. 861.

27.———Confession.—That the daughter of defendant in incest gave birth to a child held not corroboration of his extrajudicial confession, so as to warrant a conviction.—Nolan v. State, Tex., 129 S. W. 1108.

28.———Identity of Informer.—Accused is not entitled to know who gave information or made complaints which led to his prosecution.—State v. Fortin, Me., 76 Atl. 896.

29.——Incest.—In a prosecution for incest, evidence of other acts of intercourse between the parties before or subsequent to the act relied on by the state for a conviction held inadmissible —Pridemore v. State, Tex., 129 S. W. 1112.

30.——Trial before Court.—On the trial of a misdemeanor before the court, where no declarations of law were requested, there was no necessity of the court of its own motion directing itself as to the law of the case.—State v. Martin, Mo., 129 S. W. 931.

31. **Customs and Usages**—Burden of Proof.—One relying on a local usage as affecting a contract has the burden to show knowledge thereof by the parties.—Norton v. University of Maine, Me., 76 Atl. 912.

32. **Damages**—Contracts.—The measure of damages for the failure of a party to advance money to another to construct a dam to create power for a mill held not to include profits expected to be realized from the operation of the mill.—Bixby-Theison Lumber Co. v. Evans, Ala., 52 So. 843.

33.——Personal Injuries.—Where plaintiff's sister and cousin nursed him at a hotel where he was taken after his injury, the expense incurred for their board was a legitimate item of expense incurred in consequence of plaintiff's injury.—Dean v. Wabash R. Co., Mo., 129 S. W. 953.

34.——Pleading.—Evidence that plaintiff incurred liability for $250 for medicine and medical attention would not support an allegation in the petition that she has "expended" $250 for medicine and medical attention.—Dent v. Springfield Traction Co., Mo., 129 S. W. 1044.

35. **Dedication**—Use of Street.—A street dedicated to public use for the passage of vehicles and pedestrians may in addition be used for street railways, gas and electric light wires and poles, and subways, which do not interfere with or destroy its value for a public highway.—State ex rel. Roland v. Dreyer, Mo., 129 S. W. 904.

36. **Deeds**—Quit-Claim Deed.—On an issue of title, a quitclaim deed from one conceded to be the owner of the land shows absolute title, and is equivalent to title through warranty deed.—Ripley v. Trask, Me., 76 Atl. 951.

37. **Descent and Distribution**—Advancements.—The presumption that a conveyance by a parent to a child, without consideration, is an advancement, is rebuttable by competent evidence.—Lowe v. Wiseman, Ind., 92 N. E. 344.

38. **Dismissal and Nonsuit**—Involuntary Nonsuit.—An involuntary nonsuit is one that is taken by reason of some adverse ruling of the court which prevents a recovery by plaintiff.—Grattan v. Suedmeyer, Mo., 129 S. W. 1038.

39.——Voluntary Nonsuit.—Voluntary nonsuit in an action to recover land as an heir, does not bar a subsequent suit by plaintiff's grantee.—Holman v. Lewis, Me., 76 Atl. 956.

40. **Divorce**—Res Judicata.—A judgment granting a divorce in Indian Territory, in which no disposition of property rights between the parties was made, held not res judicata as to such rights.—Thomas v. Thomas, Okl., 109 Pac. 825.

41. **Dower**—Repeal of Statute.—A woman, divorced in 1891 for her husband's fault, held to have a vested property right of dower, of which she could not be deprived by repeal of the statute giving her such right.—McAllister v. Dexter & P. R. Co., Me., 76 Atl. 891.

42. **Eminent Domain**—Damages.—Where a town wrongfully built a road over an owner's land, and it and the owner treated the act as a permanent taking, the owner held entitled to recover the full value of the land.—Pinney v. Town of Winchester, Conn., 76 Atl. 994.

43.——Exercise of Power.—The right of a corporation possessing the right of eminent domain to determine for itself the amount of land necessary for the use for which it seeks land held subject to the statutory and constitutional restrictions and the limitation that the courts will prevent any abuse of the right.—Bell v. Mattoon Waterworks & Reservoir Co., Ill., 92 N. E. 352.

44. **Equity**—Bill of Review.—If a bill of review is based on newly discovered evidence, it is within the discretion of the chancellor to authorize the filing thereof, but such discretion is reviewable on appeal, if abused.—Smith v. Rucker, Ark., 129 S. W. 1079.

45. **Estoppel**—Municipal Corporations.—A city held not estopped to deny a claim to land in a street by the fact that the council visited the property and made no objection to location of improvements.—Oliver v. Synhorst, Or., 109 Pac. 762.

46.——Pleading.—An estoppel in pais need not be pleaded.—Buffalo Forge Co. v. Mutual Security Co., Conn., 76 Atl. 995.

47. **Evidence**—Admissions.—When a party comes into court and makes an admission against interest, it is presumed to be true, and no court or judicial tribunal is justified in assuming it is not, without at least pointing out the reason for discrediting it.—In re Titus Street in City of New York, 123 N. Y. Supp. 1018.

48.——Ancient Deeds.—Recitals asserting title in ancient deeds under which plaintiffs claim held admissible as bearing on the question of possession.—McMahon v. Town of Stratford, Conn., 76 Atl. 983.

49.——Bill of Sale.—A bill of sale, in which a mistake was made as to the price quoted the buyer, is not subject to alteration by parol in an action at law, but the seller's remedy is to correct it in equity.—Anton W. Luecke & Co. v. Cohen, Mo. 129 S. W. 1002.

50.——Foreign Statutes.—Where the decisions of the Supreme Court of a sister state construing a statute thereof are not offered in evidence, the court will examine such decisions only so far as they interpret the rules of the common law of the sister state, independently of the statutes.—DeVall v. DeVall, Or., 109 Pac. 755.

51.——Text-books.—Use of a medical textbook by plaintiff's counsel to aid him in forming a question propounded to a witness was proper.—Dean v. Wabash R. Co., Mo., 129 S. W. 953.

52.——Values.—Evidence as to price paid for horses injured in transportation held inadmissible in an action against the carrier, where there is evidence of their market value at their destination.—Chicago. R. I. & G. Ry. Co. v. Rogers, Tex., 129 S. W. 1155.

53.——X-ray Photographs.—An X-ray photograph of plaintiff's injured femur held admissible to illustrate the scientific explanation of plaintiff's injury by a physician.—Dean v. Wabash R. Co., Mo., 129 S. W. 953.

54. **Execution**—Choses in Action.—A chose in action is not subject to the lien of an execution, and is incapable of levy or seizure by the sheriff.—Bayer v. Doscher, 123 N. Y. Supp. 1096.

55.——Judgments.—Under the statutes authorizing courts of equity to issue executions, a decree, to be enforceable by execution, must contain the positive constituents of a judgment at common law and direct the payment of a sum of money by one party to another.—DeVall v. DeVall, Or., 109 Pac. 755.

56.——Names of the Parties.—A writ of execution reciting judgment obtained against "John Dalziel," when it should have been "James Dalziel," is fatally defective.—Harkey v. Day, Tex., 129 S. W. 1195.

57. **Executors and Administrators**—Final Settlement.—Where the final settlement of an administrator omitting a certain item had been concluded, the settlement could not be collaterally attacked for such error.—Michie v. Grainger, Mo., 129 S. W. 983.

58. **Fire Insurance**—Unconditional and Sole Ownership.—"Unconditional and sole ownership" of property, within the meaning of insurance policies, held to be in those upon whom the loss insured against would certainly fall as the result of bona fide rights in the insured property.—Phenix Ins. Co. v. Hilliard, Fla., 52 So. 799.

59. **Forcible Entry and Detainer**—Title and Right to Possession.—The title to the land or the right to its possession is not an issue in an action for forcible entry and unlawful detainer.—Underwood v. City of Caruthersville, Mo., 129 S. W. 1076.

60. **Fraud**—False Representations.—A person, induced by false representations to do an act which it was his duty to do, cannot be heard to say that he was prejudiced by such false representations.—Musconetcong Iron Works v. Delaware, L. & W. R. Co., N. J., 76 Atl. 971.

61. **Garnishment**—Rights of Execution Creditor.—In garnishment, the execution creditor held to acquire no greater right against the garnishee than was held by the principal debtor.—Louis 'Obert Brewing Co. v. Wabash R. Co., Mo., 129 S. W. 991.

62. **Guaranty**—Consideration.—A railroad held not to bind itself by contract to pay a boarding house keeper for the board of its men.—Louis Obert Brewing Co. v. Wabash R. Co., Mo., 129 S. W. 991.

63.——Remedies.—Since, under a guaranty, the guarantor and the principal's obligations are distinct, and not joint, the guarantor must be sued separately.—Levy v. Webster, Me., 76 Atl. 936.

64. **Highways**—Obstruction.—One whose property rights are specially injured by an unlawful obstruction in a public highway may seek the aid of equity when his legal remedy is inadequate.—Brown v. Florida Chautauqua Ass'n., Fla., 52 So. 802.

65. **Husband and Wife**—Community Property.—Property purchased in the name of a wife during the existence of the community becomes community property, unless by way of administration or investment of paraphernal property.—Knoblock & Rainold v. Posey, La., 52 So. 847.

66.——Wife's Separate Property.—A wife's separate property would only be bound for the payment of a community debt by reason of a mortgage executed thereon by her for that purpose.—Berry v. Hindman, Tex., 129 S. W. 1181.

67. **Infants**—Filing of Lien.—An infant's assignment of a claim for work held not to prevent the filing of a lien therefor in the name of the assignor.—Shepard v. Atchison, T. & S. F. Ry. Co., Mo., 129 S. W. 1003.

68. **Injunction**—Possession of Property.—The action for injunction is not one to try out the right to the possession of property, nor the rights of landlord and tenant under any alleged form of tenancy, nor is it the proper action to determine a question of trespass.—Reeves v. Flath, Wash., 109 Pac. 796.

69.——Violation.—Where an injunction is disregarded, and the act required or forbidden is for the benefit of a party, civil proceeding for contempt may be instituted by such party.—Lawton v. Herrick, Conn., 76 Atl. 986.

70. **Insurance**—Burglary Insurance.—A policy of insurance on an automobile, insuring against "direct loss by burglary, theft, or larceny," does not cover a taking by a former owner under a claim of ownership.—Bigus v. Pacific Coast Casualty Co., Mo., 129 S. W. 982.

71.——Wager Policies.—Wager policies are not approved, and should be avoided.—Phenix Ins. Co. v. Hilliard. Fla., 52 So. 799.

72. **Interest**—Recovery.—Specific prayer for interest on an award for conversion is not essential to its recovery if the total recovery does not exceed the amount prayed for.—Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co., Tex., 129 S. W. 1161.

73. **Intoxicating Liquors**—Illegal Sale.—If defendant, a druggist, accused of violating the local option law, understood at the time he supplied liquor to R. on a physician's order that R. had furnished the money and was going to keep the liquor himself, it was a sale to R.—State v. Farrar, Mo., 129 S. W. 1029.

74.——Unlawful Sales.—It is no defense to a prosecution for selling intoxicants without an application or prescription therefor that the liquor was sold in good faith, and used for medical purposes.—Ryan v. State, Ind., 92 N. E. 340.

75. **Judgment**—Conclusiveness.—A foreign judgment may be attacked collaterally for fraud perpetrated on the court or on one of the parties to the action.—Hall v. Hall, 123 N. Y. Supp. 1056.

76. **Jury**—Competency of Juror.—If a juror were subject to challenge for cause on account of exemption from duty, no injury could have resulted, if the objecting party failed to eliminate him by a peremptory challenge, as he could and should have done.—Colley v. State, Ala., 52 So. 832.

77. **Landlord and Tenant**—Estoppel.—A claimant to certain property having released such claims and taken a lease for a term of years from defendant, both claimant and those claiming under him, held estopped to thereafter claim title to the property.—McMahon v. Town of Stratford, Conn., 76 Atl. 983.

78. **Larceny**—Possession of Stolen Property.—Evidence of recent possession of stolen property is not in itself sufficient to justify conviction of larceny.—State v. Trosper, Mont., 109 Pac. 858.

79. **Liability Insurance**—Waiver.—A stipulation in an employer's liability policy that no claim should be paid by the insured without the written consent of the insurer held subject to be waived by parol.—London Guarantee & Accident Co. v. Mississippi Cent. R. Co., Miss., 52 So. 787.

80. **Life Insurance**—Payment of Premium.—Where insured received a life policy, and retained it three or four months, without objection or making any effort to reject it, he is liable on his note for the initial premium.—Tapia v. Baggett, Ala., 52 So. 834.

81. **Mandamus**—Existence of Remedy by Injunction.—Mandamus will not lie to prevent the threatened action of a railroad company in constructing tracks on and using, under permission granted by city ordinances, a public levee; injunction being the remedy.—State ex rel. Roland v. Dreyer, Mo., 129 S. W. 904.

82. **Master and Servant**—Contributory Negligence.—Where there are two places open which one may assume of his own free will in performing a task, if he selects an unsafe place which results in his injury, instead of the safer place, he is guilty of contributory negligence as a matter of law.—Hirsch v. Freund Bros. Bread Co., Mo., 129 S. W. 1060.

83.——Defective Appliances.—A master who fails to inspect appliances cannot complain that an injured employee was negligent in failing to discover a defect.—Raab v. Hudson River Telephone Co., 123 N. Y. Supp. 1037.

84.——Duty to Instruct.—Neglect of duty may not be charged against the master as for an omission to warn, when the servant is apprised of the particular peril.—Hirsch v. Freund Bros. Bread Co., Mo., 129 S. W. 1060.

85.——Injury to Miner.—A miner of long experience, who was injured by a rock which fell from the roof of a mine, and was not guilty of contributory negligence because he did not notice that the rock was loose.—Little v. Norton Coal Co., Kan., 109 Pac. 768.

86.——Injury to Servant.—Proprietor of a mine held bound to exercise ordinary care to discover the condition of the roof of an air course used by miners and to make the same reasonably safe.—Bauschka v. Western Coal & Mining Co., Ark., 129 S. W. 1095.

87.——Injuries to Servant.—The master is bound to anticipate and provide against what usually happens and is likely to happen in the use of the appliances provided for his servants, but not against what is remotely and slightly probable.—Valparaiso Lighting Co. v. Letherman, Ind., 92 N. E. 346.

88.——Injury to servant.—Where a servant was injured while doing a temporary job, the question of the master's negligence held to be considered with reference to the special work in which the servant was engaged and the possible danger.—McCafferty v. Maine Cent. R. Co., Me., 76 Atl. 865.

89.——Injury to Servant.—In an action under the factory act for the death of an employee, assumption of risk is not available as a defense.—Bailey v. Prime Western Spelter Co., Kan., 109 Pac. 791.

90.——Last Clear Chance.—The "last clear chance" doctrine applies only when there is some new negligence on the part of defendant, subsequent to plaintiff's negligence.—McCafferty v. Maine Cent. R. Co., Me., 76 Atl. 865.

91. **Mines and Minerals**—Excessive Location.—An excessive mineral location made in good faith is void only as to the excess, but where made with fraudulent intent the whole location is void.—Nicholls v. Lewis & Clark Mining Co., Idaho, 109 Pac. 846.

92.——Location of Claim.—Where the boundaries of a mining claim are excessive in size with fraudulent intent, it is void, or if so large as to preclude the presumption of innocent error, fraud will be presumed.—Flynn Group Mining Co. v. Murphy, Idaho, 109 Pac. 851.

93. **Mortgages**—Release.—An entry upon the appearance docket of a charge for the release of a mortgage, and cancellation of the accompanying note, is not evidence that the mortgage has been released.—Gibson v. Uppenkamp, Kan., 109 Pac. 781.

94. **Municipal Corporations**—Improvement of Private Property.—Improvement of private property in a city is not a municipal affair, but the city's control is limited to such as is necessary to protect the public welfare.—May v. Craig, Cal., 109 Pac. 842.

95.——Improvement of Street.—An abutting lot owner held generally not entitled to restrain a municipality from improving a street until he has been compensated for consequential damages from the change of a grade. — Edwards v. Thrash, Ok., 109 Pac. 832.

96.——Right to Hold Office.—A taxpayer of a city held entitled to sue to restrain the payment of salary from the city treasury to one holding office, where the facts constituting his ineligibility are matters of official record.—Forman v. Bostwick, 123 N. Y. Supp. 1048.

97.——Special Assessments.—A street is under the dominion and control of the city, and is subject to the rights of the city, to assess abutting owners for its improvement.—Benton v. State, Ala., 52 So. 842.

98.——Special Tax Bills.—Without a statute giving special tax bills a prima facie character, the burden is on the party claiming rights under them to establish their validity.—Patton v. Tate, Mo., 129 S. W. 1022.

99. **Negligence**—Contributory Negligence. — Contributory negligence cannot be considered unless there is proof tending to show it.—Richter v. United Rys. Co. of St. Louis, Mo., 129 S. W. 1055.

100.—Wharves.—The owner of a wharf was bound to use ordinary care to see that it was reasonably safe as to a stevedore employed by another in unloading coal at the wharf.—Trask v. Halowell Granite Works, Me., 76 Atl. 919.

101. **New Trial**—Time for Application.—While the usage is to render judgment when the verdict is returned, the losing party still has the rest of the term of court to move for new trial.—Woodward Iron Co. v. Brown, Ala., 52 So. 829.

102. **Nuisance**—Cancer Hospital.—The establishment of a cancer hospital in a residence neighborhood in near proximity to dwellings may be enjoined at the instance of one owning and occupying adjacent property.—Stotler v. Rochelle, Kan., 109 Pac. 788.

103.——Pollution of Stream.—A riparian proprietor held not entitled to acquire by prescription the right to maintain a nuisance by depositing materials in the stream to the damage of a lower proprietor.—Lawton v. Herrick, Conn., 76 Atl. 986.

104. **Partnership**—Dissolution. — Return of consideration received by a partner on dissolution of a partnership held not a condition precedent to bringing an action for an accounting.—Townsend v. Meyers, 123 N. Y. Supp. 1075.

105.——Good Faith.—Where two parties formed a partnership to sell insurance stock held, that good faith required that one of the parties should disclose his agreement with the insurance company that he should receive extra compensation, and should divide such proceeds with his partner.—Pratt v. Frazer, Ark., 129 S. W. 1088.

106.——Liability for Debts.—The dissolution of a partnership by a sale of the partnership property to one of the partners and his wife, would not relieve the purchasing partner from liability for firm debts.—Willis Coal & Mining Co. v. Furstenfeld, Mo., 129 S. W. 1028.

107.——What Constitutes.—A sharing of profits is not conclusive evidence of partnership.—Weiland v. Sell, Kan., 109 Pa. 771.

108. **Payment**—What Constitutes.—A debtor could not extinguish his debt by voluntarily paying some other debt which his creditor owed.—Bayer v. Doscher, 123 N. Y. Supp. 1096.

109. **Principal and Agent**—Authority of Agent. —In determining whether an agent acted within the apparent scope of his authority, the acts and knowledge of the principal alone are to be considered, and he is not chargeable with appearances of conformity to authority created by the agent alone.—Bowles Co. v. Fraser, Wash., 109 Pac. 812.

110.——Sale Without Authority.—If a sales agent contracts without authority for the sale of goods at less than the market price, the buyer cannot insist on delivery thereof at the contract price, and recover for refusal to comply with the contract.—Anton W. Luecke & Co. v. Cohen, Mo., 129 S. W. 1002.

111. **Principal and Surety**—Surety's Liability. —Surety on a builder's bond held discharged from liability by any act of the owner increasing the surety's risk.—Harris v. Taylor, Mo., 129 S. W. 995.

112. **Railroads**—Injury to Section Hand. — A locomotive engineer can rightfully assume that section men will look out for and keep clear of regular trains.—Leighton v. Wheeler, Me., 76 Atl. 916.

113.——Killing Animals.—In an action under the statute requiring railroads to fence the tracks, a petition held not to permit recovery for death of a steer on proof that it got on the track through a gate negligently left open. Murphy v. St. Louis Southwestern Ry. Co., Mo., 129 S. W. 1033.

114.——Negligence.—Where trainmen have reason to expect the presence of persons on the track or dangerously near the track, they are bound to look out for such persons and exercise reasonable care for their protection.—Laughlin v. St. Louis & S. F. R. Co., Mo., 129 S. W. 1006.

115.——Negligence.—The running of an engine or train faster than the statute permits is not negligence per se, but is competent evidence of negligence.—Moore v. Maine Cent. R. Co., Me., 76 Atl. 871.

116.——Presumptions.—A constant traveler on a line of railroad is presumptively chargeable with knowledge of the points at which trains on the line will stop.—Powell v. St. Louis & S. F. R. Co., Mo., 129 S. W. 963.

117.——Wrongful Ejectment of Passenger.—In an action for wrongful ejection of passenger, evidence of the conduct of the passenger on another train, immediately before his entering the train from which he was ejected, held admissible on the issue whether he entered the train with a view of becoming a passenger.—Powell v. St. Louis & S. F. R. Co., Mo., 129 S. W. 963.

118. **Force**—Rape.—Force is not a necessary element in rape of a female under the age of consent.—Cromeans v. State, Tex., 129 S. W. 1129.

119. **Remainders**—Accrual of Right of Action.—Where title to a half interest in land devolved on a married woman in 1865, held that, as her husband survived her, she could not have sued for it, and she had no cause of action during her life, and neither did her children during their father's life, which continued till 1892.—Glasgow v. Missouri Car & Foundry Co., Mo., 129 S. W. 900.

120. **Replevin**—Default Judgment.—A default judgment for plaintiff in replevin, without ascertaining the value of the property by writ of inquiry, is improper.—Wilburn v. Cologero, Miss., 52 So. 794.

121. **Sales**—Implied Warranty.—Where an article sold is described as of a certain kind or description, a warranty that it is of that kind or description is implied.—Rauth v. Southwestern Warehouse Co., Cal., 109 Pac. 839.

122.——Substantial Compliance With Contract.—If goods shipped by a seller were substantially as ordered by the buyer, this was sufficient.—Pruitt Commission Co. v. Fruit Dispatch Co., Tex., 129 S. W. 1150.

123.——Warranty of Fitness.—Where there is a breach of warranty of fitness, and the buyer has no opportunity to inspect, he can elect after delivery to rescind or he may affirm and recoup his damages.—B. A. Stevens Co. v. Whalen, Ark., 129 S. W. 1081.

124. **Set-off and Counterclaim**—Unliquidated Damages.—Unliquidated damages for breach of warranty in a sale cannot be the subject of a set-off.—B. A. Stevens Co. v. Whalen, Ark., 129 S. W. 1081.

125. **Specific Performance** — Discretion of Court.—A bill for specific performance is addressed to the judicial discretion of a court of equity.—Ball v. Milligan. R. I., 76 Atl. 789.

126. **Street Railroads**—Noises.—A street railroad company, having created a confusion of noises and car tracks at a crossing, was bound to be extraordinarily careful in handling its cars there.—Hanna v. New Orleans Ry. & Light Co., La., 52 So. 855.

127. **Taxation**—Assessment.—A tax assessor in assessing wild lands held not authorized to base his assessment on an unaccepted offer to buy the land.—Case v. San Juan County, Wash., 109 Pac. 809.

128.——Invalid Levy.—Injunction does not lie to arrest a whole tax levy previously made, when it is conceded that the bulk of the taxes are properly laid.—Decker v. Diemer, Mo., 129 S. W. 936.

129.——Situs of Property.—While the presumption is, in the absence of statute, that the situs of personal property for taxation purposes is at the domicile of the owner, it will give way where it appears that the property has an actual situs apart from his domicile.—State ex rel. White v. Timbrook's Estate, Mo., 126 S. W. 1068.

130.——Tax Sale.—A tax sale made during the Civil War held not void.—Wright v. Giles, Tex., 129 S. W. 1163.

131.——Valuation of Wild Lands.—Where wild land is taxed $19,000, based on a valuation of $50,000, when the tax should be based on a valuation of $15,000 and assessed at $6,000, the discrepancy amounts to a constructive fraud.—Case v. San Juan County, Wash., 109 Pac. 809.

132. **Telegraphs and Telephones**—Exemption from Liability.—A rule exempting a telegraph company from liability for damages or statutory penalties, where a claim is not presented within 60 days after a message is filed, held reasonable and binding on an addressee knowing of delay in time to file such claim.—M. M. Stone & Co. v. Postal Telegraph Co., R. I., 76 Atl. 762.

133.——Right of Way.—The legislature has the power to authorize a telephone corporation to construct its lines upon the right of way of a railroad corporation.—Canadian Pacific Ry. Co. v. Moosehead Telephone Co., Me., 76 Atl. 885.

134. **Tenancy in Common**—Occupation by One Tenant.—Occupation of common property by one tenant in common does not render him liable to his co-tenant for rent.—Thrustin v. Brown, Kan., 100 Pac. 784.

135. **Trade-Marks and Trade-Names**—Descriptive Names.—"Chantecler," as the name of a play in which a barnyard fowl is represented by each part, is not of such a descriptive character as to preclude its exclusive appropriation.—Frohman v. Morris, 123 N. Y. Supp. 1090.

136. **Trespass**—Damages.—A trespasser on real estate may not, when compensation is demanded, urge in defense that he has benefited plaintiff by his wrongful acts.—Pinney v. Town of Winchester, Conn., 76 Atl. 994.

137. **Trusts**—Wife as Cestui Que Trust.—If a conveyance be to a grantee in trust for a wife, on her husband's death, the use will be executed in her, and she will have the legal as well as the equitable title.—Glasgow v. Missouri Car & Foundry Co., Mo., 129 S. W. 900.

138. **Vendor and Purchaser**—Title of Vendor.—While a purchaser can demand a title which will enable him to hold his land in peace and one so clear as will enable him to sell the property for its fair market value, the doubt as to the title, in order to defeat specific performances, must be a reasonable one, though a purchaser will not be compelled to take a title which might in reasonable probability expose him to the hazards of litigation.—Arey v. Baer, Md., 76 Atl. 843.

139. **Warehousemen**—Obligation.—One receiving goods and issuing a receipt therefor held a bailee for any person to whom the receipt is transferred, and cannot justify a nondelivery to an assignee by proof of a delivery to the depositor without notice of the assignment.—Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank, Tex., 129 S. W. 1160.

140. **Wills**—Construction.—When words at the outset clearly indicate testator's disposition to give the entire use and benefit of an estate absolutely to the first donee, it will not be cut down by a subsequent provision unless equally clear.—Settles v. Shafer, Mo., 129 S. W. 897.

141.——Construction. — Whether the term "surviving children" as used in a will means children surviving at the death of the testator or at some other time is determined by the intent of testator, gathered from the whole will and the circumstances to which it applies.—Sullivan v. Garesche, Mo., 129 S. W. 949.